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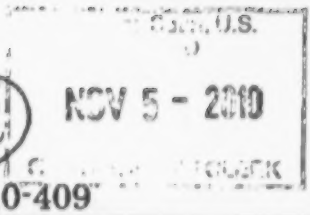

No. 10-409

In the Supreme Court of the United States

WILLIAM K. HOLMES, HOLMES CAPITAL, LLC, BREW DOG, LLC, BIMINI STAR, LLC, AND EBH INVESTMENTS CO., LLC, PETITIONERS,

v.

JACK GRUBMAN AND CITIGROUP GLOBAL MARKETS, INC., F/K/A SALOMON SMITH BARNEY & CO., INC., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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November 5, 2010

QUESTION PRESENTED

Petitioners here, who were plaintiffs in the district court, sued respondents, who were defendants in the district court, for common-law torts under Georgia law. The district court dismissed petitioners' complaints for failure to state a claim. On appeal, the Second Circuit certified questions of Georgia law to the Supreme Court of Georgia. Based on an answer provided by the Supreme Court of Georgia in a published opinion, the Second Circuit held that petitioners had failed to plead facts demonstrating proximate cause under Georgia law and accordingly affirmed the district court's judgment.

No federal question is presented. The question purportedly presented is whether the Supreme Court of Georgia, in its explanation of proximate cause as an element of common-law claims under Georgia law concerning publicly traded securities, correctly construed this Court's decision in *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U.S. 336 (2005), which explained the analogous doctrine of loss causation under the federal securities laws, and which the Supreme Court of Georgia cited as persuasive but not controlling authority.

RULE 29.6 STATEMENT

Respondent Citigroup Global Markets Inc., formerly known as Salomon Smith Barney Inc., is a wholly owned subsidiary of Citigroup Financial Products Inc. (formerly known as Salomon Brothers Holding Company Inc.), which is a wholly owned subsidiary of Citigroup Global Markets Holding Inc. (formerly known as Salomon Smith Barney Holdings Inc.), which is a wholly owned subsidiary of Citigroup Inc.

Citigroup Inc. is a publicly traded corporation that has no parent corporation. No publicly held corporation owns ten percent or more of its stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

PRELIMINARY STATEMENT 1

STATEMENT 3

REASONS FOR DENYING THE PETITION 8

I. The Petition Does Not Properly Present Any Federal Question for Review by This Court 8

II. Even If the Petition Properly Presented a Federal Question Respecting the Interpretation of *Dura*, Which It Does Not, the Petition Fails to Demonstrate Any Conflict or Other Basis for Review by This Court 13

CONCLUSION 17

TABLE OF AUTHORITIES

Cases: **Page**

Basic, Inc. v. *Levinson*,
485 U.S. 224 (1988) 16

Blue Chip Stamps v. *Manor Drug Stores*,
421 U.S. 723 (1970) 8-9

Brockett v. *Spokane Arcades, Inc.*,
472 U.S. 491 (1985) 10

Bush v. *Gore*,
531 U.S. 98 (2000) 11

Dura Pharm., Inc. v. *Broudo*,
544 U.S. 336 (2005) ..... *passim*

Emergent Capital Inv. Mgmt., LLC v.
Stonepath Group, Inc.,
343 F.3d 189 (2d Cir. 2003) 10

Glaser v. *Enzo Biochem, Inc.*,
464 F.3d 474 (4th Cir. 2006) 16

Grand v. *Nacchio*,
147 P.3d 763 (Ariz. Ct. App. 2006) 15-16

Greenberg v. *De Tessieres*,
902 F.2d 1002 (D.C. Cir. 1990) 10

Haring v. *Prosise*,
462 U.S. 306 (1983) 10

Huddleston v. *Dwyer*,
322 U.S. 232 (1944) 10

Leavitt v. *Jane L.*,
518 U.S. 137 (1996) 10

Lentell v. *Merrill Lynch & Co., Inc.*,
396 F.3d 161 (2d Cir. 2005) 14

Cases (cont.): **Page**

Livid Holdings Ltd. v. *Salomon Smith Barney, Inc.*, 416 F.3d 940 (9th Cir. 2005) 14-15

Lopez v. *Rica Foods, Inc.*, 277 Fed. Appx. 931 (11th Cir. 2008) 16

Martin v. *Heinold Commodities, Inc.*, 643 N.E.2d 734 (Ill. 1994) 10

McCabe v. *Ernst & Young LLP*, 494 F.3d 418 (3d Cir. 2007) 16

Merrill Lynch & Co., Inc. v. *Allegheny Energy, Inc.*, 500 F.3d 171 (2d Cir. 2007) 14

Merrill Lynch, Pierce, Fenner & Smith Inc. v. *Dabit*, 547 U.S. 71 (2006) 9

Michigan v. *Long*, 463 U.S. 1032 (1983) 11-12

Mullaney v. *Wilbur*, 421 U.S. 684 (1975) 11

New York City Employees' Ret. Sys. v. *Jobs*, 593 F.3d 1018 (9th Cir. 2010) 14

Okla. Tax Comm'n v. *Chickasaw Nation*, 515 U.S. 450 (1995) 10

Pierson v. *J.L. Ray*, 386 U.S. 547 (1967) 10

Schaaf v. *Residential Funding Corp.*, 517 F.3d 544 (8th Cir. 2007) 14, 16

Vaso Active Pharm., Inc. v. *Robinson & Cole LLP*, No. 06-4958, 2009 WL 971161 (Mass. Super. Jan. 23, 2009) 16

Cases (cont.): **Page**

Wharf (Holdings) Ltd. v. *United Int'l Holdings*, 532 U.S. 588 (2001) 10
In re Williams Sec. Litig.–WCG Subclass, 558 F.3d 1130 (10th Cir. 2009) 15

Statutes, Regulation, and Rules:

Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, sec. 101(b), § 21D(b)(4), 109 Stat. 737, 747 13
Securities Act of 1933 § 12(2), 15 U.S.C. 77*l* 4
Securities Exchange Act of 1934:
§ 10(b), 15 U.S.C. § 78j(b) 4, 8, 13, 16
§ 21D(b)(4), 15 U.S.C. § 78u-4(B)(4) 13
28 U.S.C. § 1257(a) 11
SEC Rule 10b-5, 17 C.F.R. 240.10b-5 ..... 4, 9, 13
Fed. R. Civ. P. 12(b)(6) 4
Sup. Ct. R. 10(a) 15

Miscellaneous:

Prosser and Keeton on the Law of Torts (W. Page Keeton ed., 5th ed. 1984) 6
Restatement (Second) of Torts (1977) 6

PRELIMINARY STATEMENT

Petitioners William K. Holmes and investment vehicles he owns and controls (collectively, "Holmes") correctly describe the claims at issue here as his "*state law* claims for breach of fiduciary duty, negligent misrepresentation and fraud" against respondents. Pet. i (emphasis added). All parties and the courts below have acknowledged that these claims arise under the common law of Georgia. Pet. App. 2a-3a, 6a, 20a-21a, 23a, 31a, 46a, 53a-60a, 69a. His claims "are not federal securities fraud claims." Pet. i.

The district court dismissed Holmes's claims for failure to state a claim. Pet. App. 53a-63a. On appeal, the Second Circuit certified three questions of Georgia law to the Supreme Court of Georgia, including a question concerning the requirements for demonstrating proximate cause "under Georgia law." Pet. App. 42a-43a. In its answer to that certified question, the Supreme Court of Georgia ruled that under Georgia law, "with respect to a tort claim based on misrepresentations or omissions concerning publicly traded securities, a plaintiff at trial has the burden of proving that the truth concealed by the defendant entered the marketplace, thereby precipitating a drop in the price of the security." Pet. App. 16a. In so holding, the Georgia court found this Court's opinion in *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U.S. 336 (2005), which explained the analogous doctrine of loss causation under the federal securities laws, to be "informative" (Pet. App. 15a), but the Georgia court did not decide any federal question.

The Second Circuit, by unpublished summary order, then affirmed the judgment of the district court. Pet.

App. 4a. The Second Circuit held that under the legal standard quoted above from the Supreme Court of Georgia's answer to the relevant certified question, Holmes had failed to plead facts demonstrating proximate cause as an element of his common-law claims under Georgia law. Pet. App. 1a-4a.

The implicit premise of Holmes's petition is that because the Supreme Court of Georgia, in interpreting the doctrine of proximate cause under Georgia common law, found this Court's analysis in *Dura* of an analogous doctrine under the federal securities laws to be "informative," the Georgia court and the Second Circuit must have decided a federal question. That premise is mistaken: the relevant holdings of the Georgia court and the Second Circuit rested entirely on Georgia law. Except in extraordinary circumstances not present here, this Court does not grant certiorari to a federal court of appeals in order to review a decision on a question of state law. And here, the governing rule of Georgia law was determined by the Supreme Court of Georgia in this very case. As a decision of state law by a state's highest court is ordinarily binding on all federal courts, including this Court, the decisions below are particularly inappropriate for review. Holmes also fails to demonstrate any reason why this Court should grant review to elaborate on the holding of *Dura*—even assuming, contrary to the facts, that the decisions below rested on an application of the federal law explained in *Dura*.

STATEMENT

1. As of June 1999, Holmes owned approximately 2.1 million shares of common stock of WorldCom, Inc., which was a telecommunications company. Holmes's stockbroker was respondent Salomon Smith Barney Inc., which is now known as Citigroup Global Markets Inc. ("SSB"). SSB employed the other respondent, Jack Grubman, as an equity analyst. Pet. App. 5a, 22a.

On June 25, 1999, Holmes allegedly telephoned his broker at SSB and placed an oral order to sell all of his WorldCom shares. The broker allegedly dissuaded Holmes from selling his WorldCom shares based on analyst reports and related analysis concerning WorldCom that Grubman had prepared and that SSB had publicly disseminated. According to Holmes, Grubman's analyst reports and other analysis did not disclose alleged conflicts of interest on SSB's part and employed unprincipled methodology. After June 25, 1999, Holmes purchased additional WorldCom shares and entered into options transactions in WorldCom stock in supposed reliance on Grubman's work. Pet. App. 5a, 22a-23a, 46a-48a, 52a-53a, 69a-71a.

Holmes's WorldCom shares and options declined in price from June 1999 to October 2000. By October 2000, all of his WorldCom shares and options had been involuntarily liquidated to pay margin calls. Pet. App. 5a, 22a-23a. Holmes does not allege any reason for the decline in price of WorldCom shares from June 1999 to October 2000. *See* Pet. App. 57a-60a & nn.7-8. That period coincided with a sector-wide decline in the prices of telecommunications stocks generally, including WorldCom stock.

WorldCom entered bankruptcy proceedings in 2002, shortly after the public revelation of a major accounting fraud perpetrated by its senior executives. Pet. App. 5a, 26a n.3, 69a. As the district court in this case observed, "[t]hat fraud did not begin to come to light until early 2002, long after Holmes' entire portfolio in WorldCom securities had been liquidated to meet margin calls." Pet. App. 57a-58a n.7.

2. Holmes initiated a bankruptcy case under Chapter 11 in the United States Bankruptcy Court for the Middle District of Georgia. As part of that case, Holmes brought this action in June 2003 as an adversary proceeding. The Judicial Panel on Multi-District Litigation transferred this action to the United States District Court for the Southern District of New York. The district court dismissed Holmes's complaints for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Pet. App. 23a-24a, 45a-46a, 67a, 76a.

As relevant here, Holmes's complaints asserted common-law claims under Georgia law for negligence, negligent misrepresentation, and fraud against SSB and Grubman, and for breach of fiduciary duty against SSB alone, based on Grubman's allegedly defective work. *See* Pet. i, 11, 12-13, 17; Pet. App. 48a.[1] The

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[1] Holmes's initial complaint purported to assert a claim under section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78j(b), and SEC Rule 10b-5, 17 C.F.R. 240.10b-5. (2d Cir. J.A. A-1111 to A-1112.) Holmes's First Amended Complaint purported to reassert that claim and to assert a claim under section 12(2) of the Securities Act of 1933, 15 U.S.C. § 77*l*. (2d Cir. J.A. A-1166 to A-1169.) Holmes voluntarily abandoned these claims by omitting them from his Second Amended Complaint (2d Cir. J.A. A-1599 to A-1634), and he did not

district court dismissed Holmes's claim for breach of fiduciary duty on the ground that under Georgia law, SSB did not owe a fiduciary duty to Holmes. Pet. App. 61a-63a.

The district court dismissed Holmes's claims for fraud, negligence, and negligent misrepresentation on the ground that Holmes had failed to plead facts demonstrating proximate cause. Pet. App. 60a. "Proximate causation," the district court held, "is an element of a claim of fraud under Georgia law. Similarly, proximate causation is one of the elements of a claim of negligence under Georgia law." Pet. App. 53a (citations to decisions by Georgia courts omitted). The district court then looked for guidance to this Court's decision in *Dura Pharmaceuticals* v. *Broudo*, 544 U.S. 336 (2005). In *Dura*, this Court analyzed loss causation as an element of a fraud claim under section 10(b) of the Exchange Act and Rule 10b-5. In explaining loss causation, the *Dura* Court relied on precedents and authorities interpreting the analogous doctrine of proximate cause under the common law. *Id.* at 343-45. Surveying these authorities, the district court in this case ruled that:

> Applying the principle of proximate causation to tort claims based on misrepresentations or omissions concerning securities requires an assertion that the truth concealed by the defendant entered the market place. With such an assertion, a trading loss can be said to have been proximately caused by a prior misrep-

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thereafter attempt to reassert any claim under the federal securities laws.

> resentation. *See Dura Pharmaceuticals, Inc. v. Broudo*, [544 U.S. 336 (2005).] In the absence of a disclosure, the misrepresentation has simply permitted the stock to trade at an inflated price. Until the concealed information is disclosed, a drop in price may reflect any number of things, but it will not reflect the impact of the misrepresentation or omission on the stock price.

Pet. App. 55a.

As the district court explained, these principles "are widely recognized preconditions for a tort recovery." Pet. App. 55a-56a (discussing *Restatement (Second) of Torts* § 548A cmts. a & b (1977), and *Prosser and Keeton on the Law of Torts* § 110 (W. Page Keeton ed., 5th ed. 1984). In the district court's view, which on this point correctly anticipated the ruling of the Supreme Court of Georgia described below, "[t]here is no reason to believe that the Georgia common law embodies any different standard." Pet. App. 57a. Holmes's complaints did not meet this standard, the district court ruled, because he had "not given [SSB and Grubman] fair notice of his theory of proximate causation, that is, how any risk concealed by [SSB and Grubman] materialized before [Holmes's] portfolio was involuntarily sold." Pet. App. 60a.

3. Holmes appealed from the district court's judgment to the Second Circuit. In its initial opinion on that appeal, the Second Circuit observed that "Georgia courts have not decided whether a plaintiff may establish a *prima facie* case for securities fraud without alleging that the information allegedly withheld by defendants entered the marketplace and caused the

value of securities to decrease." Pet. App. 40a-41a. Accordingly, the Second Circuit certified the following question of Georgia law (along with two other questions of Georgia law) to the Supreme Court of Georgia:

> With respect to a tort claim based on misrepresentations or omissions concerning publicly traded securities, is proximate cause adequately pleaded under Georgia law when a plaintiff alleges that his injury was a reasonably foreseeable result of defendant's false or misleading statements but does not allege that the truth concealed by the defendant entered the market place, thereby precipitating a drop in the price of the security?

Pet. App. 42a-43a.

The Supreme Court of Georgia answered the questions certified by the Second Circuit in a unanimous published opinion. Pet App. 5a-18a. In that opinion, the Supreme Court of Georgia ruled that "with respect to a tort claim based on misrepresentations or omissions concerning publicly traded securities, a plaintiff at trial has the burden of proving that the truth concealed by the defendant entered the market-place, thereby precipitating a drop in the price of the security." Pet. App. 16a. In support of this conclusion, the Georgia court noted that "in order to recover in tort for fraud, the plaintiff must prove that he sustained loss or damage as the proximate result of the alleged misrepresentations." Pet. App. 14a (citing six prior decisions of the Georgia Supreme Court). The Georgia court further explained that it found the reasoning of this

Court's decision in *Dura* "informative" on the proximate-cause issue. Pet. App. 15a-16a.

The appeal then returned to the Second Circuit for final resolution in that court. As the Second Circuit stated in its second opinion, "[t]he District Court dismissed [Holmes's] claims of fraud, negligence, and negligent misrepresentation because [Holmes] failed to plead adequately proximate cause, and the Supreme Court of Georgia confirmed that in doing so, the District Court applied the correct legal standard." Pet. App. 4a. Although the district court had dismissed Holmes's claim for breach of fiduciary duty on another ground, the Second Circuit observed that "proximate cause is an element of a claim for breach of fiduciary duty" under Georgia law, and consequently held that "dismissal of that claim was also warranted." *Id.* The Second Circuit therefore affirmed the judgment of the district court. *Id.*

REASONS FOR DENYING THE PETITION

I. The Petition Does Not Properly Present Any Federal Question for Review by This Court

Holmes's petition presents no question for review under the federal securities laws. Holmes did not pursue any claim under those laws, presumably because the great bulk of his purported damages arose from his alleged decision to forbear from selling his WorldCom shares in reliance on allegedly fraudulent statements. As to these purported damages, Holmes could not have established standing to bring a private claim under section 10(b) of the Exchange Act. *See Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1970) (holding that only a purchaser or seller of

securities has standing to bring a private claim under § 10(b) and Rule 10b-5); *see also Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 78-81 (2006).

Instead, Holmes brought, as relevant here, only claims for negligence, negligent misrepresentation, fraud, and breach of fiduciary duty under the common law of Georgia. The Supreme Court of Georgia, in response to the Second Circuit's certified question on the subject, issued an opinion on the meaning of proximate cause under Georgia law. In its discussion, the Georgia court found "informative"—i.e., regarded as persuasive authority—this Court's decision in *Dura*. Pet. App. 15a-16a.

In *Dura*, this Court interpreted loss causation as an element of a fraud claim under section 10(b) of the Exchange Act and Rule 10b-5. Loss causation is analogous to proximate cause as an element of a common-law tort based on misrepresentations or omissions concerning publicly traded securities. *See Dura*, 544 U.S. at 343-45. It was thus natural for the *Dura* Court to look, as it did, for guidance to common-law cases and authorities. *See id.* And given the roots of *Dura* in the common law, it was also natural for the Supreme Court of Georgia to find that *Dura's* analysis of loss causation had persuasive force in this case.

But because Holmes's claims, as presented to the Supreme Court of Georgia and the Second Circuit, "are not federal securities fraud claims" (Pet. i), *Dura* did not directly govern any aspect of this case. *Dura* thus was not, and could not have been, controlling authority in the Supreme Court of Georgia. The Georgia court accurately read *Dura* to have "adopted common law causation requirements" (Pet. App. 15a), which sug-

gests that the Georgia court would have followed the common-law authorities and principles described in *Dura* even if *Dura* itself had never been decided. There is certainly no basis in the Georgia court's opinion for assuming that the Georgia court's decision would have been different in the absence of *Dura*. Even before *Dura*, courts applying the common law of states other than Georgia had ruled in substance that in order to show proximate cause in a securities case, a plaintiff must demonstrate a materialization of the risk concealed by the defendant.[2]

This Court does "not normally grant petitions for certiorari to review what purports to be an application of state law." *Leavitt* v. *Jane L.*, 518 U.S. 137, 144 (1996); *see Haring* v. *Prosise*, 462 U.S. 306, 314 n.8 (1983) ("[S]tanding alone, a challenge to state-law determinations by the Court of Appeals will rarely constitute an appropriate subject of this Court's review."); *Pierson* v. *J.L. Ray*, 386 U.S. 547, 558 n.12 (1967) ("We do not ordinarily review the holding of a court of appeals on a matter of state law, and we find no reason for departing from that tradition in this case.").[3] This principle has particular force here, where the Second

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[2] *See, e.g., Martin* v. *Heinold Commodities, Inc.*, 643 N.E.2d 734, 746-47 (Ill. 1994); *Emergent Capital Inv. Mgmt., LLC* v. *Stonepath Group, Inc.*, 343 F.3d 189, 197-98 (2d Cir. 2003) (New York law); *see also Greenberg* v. *De Tessieres*, 902 F.2d 1002, 1004 (D.C. Cir. 1990) (common-law fraud claim under District of Columbia law relating to investment in loan).

[3] *See also Wharf (Holdings) Ltd.* v. *United Int'l Holdings, Inc.*, 532 U.S. 588, 596 (2001) (refusing, in opinion on merits, to review determination of state law by federal court of appeals, because "we ordinarily will not consider such a state-law issue"); *Okla. Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 461-62 (1995); *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985); *Huddleston* v. *Dwyer*, 322 U.S. 232, 237 (1944).

Circuit's application of Georgia law followed directly from an exposition of that law by the Supreme Court of Georgia in this very case based on the same record that was before the Second Circuit. "The Court . . . repeatedly has held that state courts are the ultimate expositors of state law, and that we are bound by their constructions except in extreme circumstances not present here." *Mullaney* v. *Wilbur*, 421 U.S. 684, 691 (1975) (citing cases); *see also Bush* v. *Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring); *id.* at 123 (Stevens, J., dissenting); *id.* at 142 (Ginsburg, J., dissenting).

Holmes's petition focuses his attack on the rule of law announced by the Supreme Court of Georgia. And that decision was indeed the crucial event on appeal in this case. After the Georgia court had issued its decision, Holmes's claims were doomed; the Second Circuit just carried out the sentence. In any event, the Second Circuit's application of the rule of law announced by the Georgia court to Holmes's particular pleadings involved only case-specific issues not warranting this Court's review.

Even apart from problems of finality, however, Holmes could not have obtained direct review by this Court of the decision of the Supreme Court of Georgia, because that decision rested on an adequate and independent state ground. As the opinion of the Georgia court makes plain, that "state court cho[se] merely to rely on [a] federal precedent[ ] as it would on the precedents of all other jurisdictions"; *Dura* was "being used [by the Georgia court] only for the purpose of guidance, and d[id] not [itself] compel the result that the court . . . reached." *Michigan* v. *Long*, 463 U.S. 1032, 1041 (1983); *see also* 28 U.S.C. § 1257(a).

Holmes, who is effectively seeking review of the Georgia court's decision, should not be able to obtain indirect review of the Georgia court's decision through the petition now before the Court, where the principles of federalism, comity, and judicial efficiency that *Michigan* v. *Long* furthers would have barred direct review, simply because the case went from the Georgia court to the Second Circuit. In other words, this Court's authority to review a decision by a federal court of appeals on an issue of state law, which is exercised only very rarely, should not be exercised where the controlling decision of state law was rendered by the highest court of the relevant state in the very case at hand, and where *Michigan* v. *Long* would not have permitted direct review of that decision.

Holmes's petition provides no warrant for departing from these fundamental principles. Point I of the petition seems to argue that claims for fraud and negligent misrepresentation under the common law of a state should provide broader protections to investors than claims under the federal securities laws. Point II of the petition seems to argue that claims for breach of fiduciary duty under the common law of a state should provide broader protections to the customers of stockbrokers, and should impose more extensive potential liability on stockbrokers, than *Dura* permits for claims under the federal securities laws. Point III of the petition seems to argue that the Supreme Court of Georgia, by interpreting a traditional element of a common-law claim in a manner consistent with *Dura* and with *Dura's* description of the common law, invaded the prerogatives of the Georgia legislature and engaged in "'judicial legislation.'" Pet. 17. The dispositive answer to all of these contentions is the same: the Supreme Court of Georgia announced the rule of Geor-

gia law to which Holmes objects. This Court does not sit to review decisions of a state's highest court on state law.

II. Even If the Petition Properly Presented a Federal Question Respecting the Interpretation of *Dura*, Which It Does Not, the Petition Fails to Demonstrate Any Conflict or Other Basis for Review by This Court

Holmes argues that the lower courts are in conflict over the proper interpretation of *Dura* (Pet. 14-17), which has controlling precedential force only for claims under the federal securities laws. As Holmes's claims are not claims under the federal securities laws, this case is not an appropriate vehicle for this Court to elaborate on the holding of *Dura*.[4]

In addition, although different courts sometime use somewhat different verbal formulations to describe *Dura*, Holmes fails to demonstrate the existence of any

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[4] Holmes's petition contains numerous references to the *Dura* "pleading standard." Pet. i, ii, 12; *see also id.* at 14, 17. *Dura* did not primarily concern pleading standards; it explained loss causation as a substantive element of a private action under section 10(b) of the Exchange Act and Rule 10b-5. Holmes's petition also inaccurately implies that the courts below rejected Holmes's pleadings as barred by section 21D(b)(4) of the Exchange Act, 15 U.S.C. § 78u-4(b)(4), which was added to that Act by section 101(b) of the Private Securities Litigation Reform Act of 1995 (the "PSLRA"), Pub. L. No. 104-67, 109 Stat. 737, 747. Pet. i., ii, 8, 9, 10, 13, 17. Section 21D(b)(4) concerns economic loss and loss causation as elements of a private action under the Exchange Act. None of the courts below applied section 21D(b)(4) or any other section of the PSLRA to this case. The pleading requirements applicable to this case, as all of the courts below recognized, are those set forth in the Federal Rules of Civil Procedure. Pet. App. 14a, 22a, 25a, 49a-50a.

actual conflict concerning that case that warrants review by this Court. He also does not argue, and could not credibly argue, that the result in this case would have been different under the formulations set forth in any of the allegedly conflicting cases he cites. For example, *Schaaf* v. *Residential Funding Corp.*, 517 F.3d 544 (8th Cir. 2007), commented that the standard for loss causation under *Dura* "does not differ from that employed in a common-law fraud case." *Id.* at 550. As *Schaaf* further noted, this standard requires a plaintiff to show, among other things, that a loss was "'caused by the materialization of the concealed risk.'" *Id.* (quoting *Lentell* v. *Merrill Lynch & Co., Inc.*, 396 F.3d 161, 173 (2d Cir. 2005)). In this case, the district court held that Holmes "has not given [SSB and Grubman] fair notice of . . . how any risk concealed by [SSB and Grubman] materialized before his portfolio was involuntarily sold." Pet. App. 60a.

New York City Employees' Retirement System v. *Jobs*, 593 F.3d 1018, 1024 (9th Cir. 2010), merely observed in dicta that "*Dura* does not purport to establish a single method of proving loss causation," and immediately proceeded to reject plaintiffs' allegations respecting loss causation. *Merrill Lynch & Co., Inc.* v. *Allegheny Energy, Inc.*, 500 F.3d 171, 182-83 (2d Cir. 2007), held that the analysis in *Dura* was not fully applicable to a particular claim for common-law fraud under New York law because that claim, unlike Holmes's claims, did not relate to securities. *Livid Holdings Ltd.* v. *Salomon Smith Barney, Inc.*, 416 F.3d 940 (9th Cir. 2005), concerned a "private sale of privately traded stock," *id.* at 949 n.2, while the holdings of the courts below were expressly limited to "publicly traded securities" (Pet. App. 2a, 16a). And the *Livid* plaintiff, whose complaint was upheld, alleged facts showing

that the defendants' misrepresentation "was directly related to the actual economic loss it suffered," 416 F.3d at 949, and "was causally related to the loss it sustained," *id.* at 949 n.2. In contrast, Holmes pleaded no such facts.

According to Holmes's petition, *Grand* v. *Nacchio*, 147 P.3d 763 (Ariz. Ct. App. 2006), adopted a view of *Dura* that differs from the view set forth by the courts below. Pet. 15-17. Under *Grand*, the approach to loss causation described in *Dura* also applies to proximate cause as an element of certain statutory and common-law claims under Arizona law. 147 P. 3d at 782. In dicta, *Grand* questioned the breadth with which several federal courts had characterized *Dura*, but *Grand* agreed that under *Dura*, "a plaintiff must show a causal connection between a defendant's alleged misrepresentations and a decline in share value." *Id.* at 774-75. *Grand* ultimately concluded that the relevant claims under Arizona law in that case should be dismissed because the plaintiff had not satisfied this standard. *Id.* at 782-83.

Holmes's complaints did not allege any reason for the decline in price of WorldCom shares between June 1999 and October 2000, and he therefore manifestly failed to plead the "causal connection" required by *Grand*. In any event, as *Grand* was decided by an intermediate state appellate court, the views in that opinion on what Holmes claims to be an issue of federal law could not give rise to a conflict for purposes of this Court's certiorari jurisdiction. *See* S. Ct. R. 10(a).[5]

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[5] Holmes is wrong to suggest that the holding as to loss causation in *In re Williams Securities Litigation–WCG Subclass*, 558 F.3d 1130 (10th Cir. 2009), is inapplicable to a direct-reliance,

Holmes's petition can also be read to suggest that the lower courts are in conflict as to whether a court, in interpreting proximate cause as an element of a common-law tort under state law based on misrepresentations or omissions concerning publicly traded securities, should or should not choose to follow the principles explained in *Dura*. *See* Pet. 15 (citing *Lopez* v. *Rica Foods, Inc.*, 277 Fed. Appx. 931 (11th Cir. 2008) (purporting to apply Florida law)), 17. That suggestion, if Holmes does intend to advance it, would be incorrect. First, such an alleged "conflict" would not constitute a conflict on any question of federal law or even on any question of the law of any particular state. Second, there is no such divergence in the state-law decisions addressing this issue. So far as SSB is aware, all of the cases to have addressed this question since *Dura*, with the sole exception of the aberrational decision in the *Lopez* case, which was not officially reported and has no precedential force, have found that *Dura* does provide appropriate guidance in common-law cases.[6]

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individual claim. Pet. 14 n.2. The fraud-on-the-market presumptions involve reliance, *not* loss causation. *See Basic, Inc.* v. *Levinson*, 485 U.S. 224, 248 (1988). Accordingly, the requirement that a plaintiff in an action under section 10(b) of the Exchange Act plead and prove loss causation is fully applicable to a direct-reliance, individual (as opposed to class-action) claim. *See McCabe* v. *Ernst & Young LLP*, 494 F.3d 418, 425 n.2 (3d Cir. 2007).

[6] *See, e.g.*, *Grand*, 147 P.3d at 782 (Arizona law); *Vaso Active Pharm., Inc.*, v. *Robinson & Cole LLP*, No. 06-4958, 2009 WL 971161, at *8 (Mass. Super. Jan. 23, 2009); *Schaaf*, 517 F.3d at 549-53 (Minnesota law); *McCabe*, 494 F.3d at 438-39 (New Jersey law); *Glaser* v. *Enzo Biochem, Inc.*, 464 F.3d 474, 477-80 (4th Cir. 2006) (Virginia law).

CONCLUSION

The petition for a writ of certiorari should be denied.

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Respectfully submitted,

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